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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ERIN ANDREW CONN, *Petitioner,*

v.

JENNIFER ANN CONN, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTION PRESENTED

Do *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court, under any and all circumstances, from taking into account, on a case by case basis, the interests of a father in his unborn child when his wife wants an abortion?

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PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT[1]

Petitioner Erin Andrew Conn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Supreme Court, entered in the above-entitled proceeding on July 15, 1988.

OPINIONS BELOW

The Order of the Indiana Supreme Court (not reported) affirming the Indiana Court of Appeals and adopting its opinion is reprinted in the appendix hereto, p. 1a, *infra*.

The Dissenting Opinion of Pivarnik, J., to the Order of the

[1] Pursuant to Rules of the Supreme Court of the United States, Rule 28.4(c), Petitioner hereby states that 28 U.S.C. 2403(b) may be applicable, due to the fact that constitutional and statutory provisions of the State of Indiana have been drawn into question regarding their Federal Constitutionality as applied. No court has yet certified to the Attorney General of Indiana that such provisions have been drawn into question.

Indiana Supreme Court (not reported) is reprinted in the appendix hereto, p. 2a, *infra*.

The opinion of the Indiana Court of Appeals (not yet reported) is reprinted in the appendix hereto, p. 13a, *infra*.

The Findings of Fact, Conclusions of Law, and Order of the Shelby [Indiana] Circuit Court is reprinted in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Indiana Supreme Court is invoked under 28 U.S.C. § 1257 (3) based on (1) the fact that the validity of state statutes, as applied, have been called into question under the Constitution of the United States and on (2) the assertion of the Respondent (the Wife herein) of rights under the Fourteenth Amendment of the Constitution, and (3) the assertion by the Petitioner (the Father herein) of rights under the Fourteenth and Ninth Amendments of the Constitution.

The Father brought this action in Shelby Circuit Court, invoking the equitable injunctive powers of the court, granted to it under Indiana constitutional and statutory authority, to weigh his interests in his unborn child against those of his wife in aborting their unborn child. The Wife asserted that her liberty to choose abortion under *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), was absolute and prohibited such assertion of paternal rights and interests. The Shelby Circuit Court concluded that these cases did not prohibit a case by case judicial inquiry into the relative weight of the interests of the Father and Wife herein, and, on the facts of this case, issued a preliminary injunction enjoining the Wife from obtaining an abortion. See p. 27a, *infra*.

On the Wife's appeal, the Indiana Court of Appeals, on July 12, 1988, held that *Roe* and *Danforth* precluded consideration of the Father's rights and interests under any and all set of facts

and ordered the trial court to dissolve the preliminary injunction and dismiss all proceedings relating to the abortion.

The Indiana Supreme Court transferred the case to itself and likewise held that *Roe* and *Danforth* precluded the application of the court's injunctive power and that a woman's constitutional right to abortion was absolute as against the father of the unborn child. Thus, the Indiana statutes granting injunctive power to the trial court were effectively held unconstitutional as applied. Further, the Court refused to recognize the asserted rights of the Father to a judicial consideration of his interests under the Equal Protection and Due Process clauses of the Fourteenth Amendment and the Ninth Amendment. The Indiana Supreme Court issued its judgment and opinion on July 15, 1988. See p. 1a, *infra*. A Petition for Rehearing was denied on July 18, 1988. See p. 31a, *infra*.

The Shelby Circuit Court, pursuant to the Order of the Indiana Supreme Court, dissolved the preliminary injunction and dismissed all proceedings related to the abortion issue by docket entry of July 22, 1988, effective at 4:30 P.M. See p. 30a, *infra*.

Thus, there is a final decision in this cause from the highest court of the state of Indiana in a case raising issues under the Constitution as required by § 1257(3).

STATUTES INVOLVED

A number of Indiana constitutional and statutory provisions provide the trial court with equitable authority to adjudicate rights and interests and issue injunctions. These were effectively held unconstitutional as applied. They are set forth in the appendix. See p. 40a, *infra*.

STATEMENT OF THE CASE

In June of 1988, Erin Andrew Conn (the Father herein) learned that his wife, Jennifer Ann Conn (the Wife herein), was planning to abort the unborn child which they had conceived

within their marital relationship. The Wife had filed for dissolution, and advised the Father that she would abort the child if there was any chance of his gaining custody of her.[1] She did agree to carry the child to term if the Father would submit to putting the child up for adoption by a third party, foreign to the marriage.

The Father, distraught by this news, immediately sought legal advice. Based primarily on the precedent of a trial court in Vigo County, Indiana,[2] (in which a court had issued a permanent injunction barring a woman from aborting a child based on a consideration of the rights and interests of the father along with her own) and on a careful reading of what *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, actually held, the Shelby Circuit Court issued a temporary restraining order forbidding the Wife from aborting the unborn child until a hearing could be held. Upon the evidence at the hearing, the court preliminarily enjoined the Wife from aborting their unborn child until a hearing on a permanent injunction could be held.

The Father is twenty-three years old. He is seven courses short of receiving a bachelors degree in mathematics. He is assistant manager at a toy store and a second lieutenant in the United States Army Reserves. He has a history of stable employment, as does his family.

The Wife is nineteen. She is not in school, nor has she indicated any plans to pursue further education. She is unemployed.

The Conns have been married for fourteen months and have a five month old daughter, Crystal Rose Conn. They had

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[1] As the sex of the unborn child is unknown, he or she will be referred to herein as a female to avoid the awkward use of pronouns of alternative gender throughout this document.

[2] *Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App., filed April 12, 1988).

planned to attempt another conception in August, 1988. The Wife was approximately six weeks pregnant on June 27, when the Indiana Court of Appeals issued its opinion and judgment.

The testimony regarding the Wife's reasons for desiring an abortion mentioned only two reasons: that she did not want the Father to get custody of the child and her feeling that they could not financially afford another child. However, the Father currently makes $318 per week, plus a bonus based on profits to the retail chain store where he works, and $200 per month as an officer in the Army Reserves. Within the near future he anticipates receiving management training, by his employer, which will increase his income to between $350 and $450 per week (in addition to his military pay). The Father feels he is able to provide for the financial needs of the child and his family. Further, he has insurance to cover the expenses of prenatal care and the medical and hospital expenses of childbirth.

The record clearly indicates that the Father would suffer severe and irreparable harm, including the permanent loss of his right to care, custody, control and companionship of this child. The Father testified that losing his child would be like losing a part of himself. He desires that she be born "so that he can raise, nurture the child, and give the child everything he has." See p. 24a, *infra*.

The constitutional claims giving this Court jurisdiction under § 1257(3) were raised from the very beginning. The temporary restraining order was issued on June 17, 1988, by the Shelby County (Indiana) Circuit Court. In his Brief in Support of Motion for Preliminary Injunction, the Father argued that the Shelby Circuit Court had jurisdiction and power to issue a preliminary injunction, barring his Wife from obtaining an abortion, pursuant to the statutes governing dissolutions and to those giving the Shelby Circuit Court general powers and jurisdiction. Brief in Support of Motion for Preliminary Injunction at 2. He further argued that neither *Roe v. Wade*, 410 U.S. 113, nor *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, precluded the Shelby Circuit Court from issuing a preliminary injunction. Brief in Support of Motion for Preliminary Injunction at 4-7, 12-16.

The Father also asserted positive rights and interests in his unborn child of a federal constitutional dimension which should properly be weighed with the rights and interests of his wife to choose an abortion. *Id.* at 16-22.

On June 23, 1988, the Wife filed with the trial court a Motion to Dissolve Temporary Restraining Order and Motion for Immediate Ruling or, alternatively, for Immediate Hearing, citing *Roe* and *Danforth* for the proposition that she had an absolute right to obtain an abortion, unreviewable under any circumstances. On June 24, 1988, the Wife filed a Motion to Vacate Order to Show Cause and appeared at the hearing set by the circuit court.

At the hearing, the motion to dissolve the temporary restraining order was denied and the circuit court granted the Wife's motion to dissolve the order to show cause. An evidentiary hearing was then conducted on whether a preliminary injunction should be granted.

Based on the evidence, the circuit court issued a preliminary injunction, ruling that in a balancing of the Father's rights and interests in his unborn child with those of the Wife in aborting the child, on the facts of this particular case, the balance weighed in favor of the Father and he had, therefore, demonstrated a likelihood of success on the merits. Therefore, on June 27, 1988, the Shelby Circuit Court ordered the Wife not to abort her unborn child. See p. 27a, *infra*.

In his Brief before the Court of Appeals, the Father renewed his claim that, under I.C. § 33-4-6-2 (the general jurisdictional power grant of authority) and I.C. § 31-1-11.5-1(a)(2) (the dissolution statute authorizing the provision of "appropriate procedures for the dissolution of marriage"), the Shelby Circuit Court had power to preliminarily enjoin the Wife from obtaining an abortion, based on a balancing of their interests and that *Danforth* did not prohibit such judicial action. Brief of Appellee at 43, 5. He also asserted a constitutional right to consideration of his rights and interests in his child. *Id.* at 30.

On July 12, 1988, the Indiana Court of Appeals reversed the circuit court, holding that *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, was dispositive and precluded Indiana courts from exercising their state statutory and constitutional powers to consider the competing rights and interests of a mother and father in their unborn child and to issue injunctions in the abortion context. See p. 13a, *infra*. The Court of Appeals noted the Father's claim that "*Danforth* d[id] not preclude this court from resorting to a balancing test of the competing rights of the husband and wife." See p. 18a, *infra*.

In his Petition for Transfer and Expedited Appeal to the Indiana Supreme Court, the Father again asserted his statutory rights to an equitable balancing and injunction and again asserted that *Danforth* did not preclude such judicial action. See p.35a, *infra*. He also asserted his Equal Protection and Due Process rights to a judicial balancing of his rights and interests with those of his Wife to determine whether or not she should be able to obtain an abortion. *Id.*

The Indiana Supreme Court, in a series of orders filed July 15, 1988, transferred the case to itself, adopted the opinion of the Indiana Court of Appeals as its own, and ordered the Shelby Circuit Court to vacate the preliminary injunction and dismiss all proceedings relating to the abortion on Friday, July 22, 1988, at 4:30 p.m. See pp. 1a, 11a, 12a, *infra*.

The Father appealed to Justice Stevens and the Chief Justice for a stay pending expedited consideration of the case. These applications were denied on July 20 and 21, 1988, respectively. The Father has received no official notice that any abortion of his unborn child has yet taken place, but, if it has, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases.[3]

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[3] *Roe v. Wade*, 410 U.S. at 125. In both *Roe* and *Doe v. Bolton*, 410 U.S. 179, 187 (1973), this Court granted review of cases to women who had already completed their pregnancies. As explained by Justices Scalia and O'Connor,

(Footnote continued)

REASONS FOR GRANTING THE WRIT

I. The Indiana Supreme Court erred in holding that *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court from considering the rights and interests of a father, under any set of facts, when his wife wishes to abort their unborn child.

This Court will consider granting a Writ of Certiorari when "a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applica-

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Footnote 3 continued

concurring in the recent case of *Honig v. Doe*, 108 S.Ct. 592 (1988), abortion jurisprudence "differ[s] from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without ever reaching us." *Id.* at 609 (emphasis in original). In the instant case, the same principle is applicable. Although the Father and the Wife may never again have occasion to litigate between them her right to an abortion, there is at least as great a possibility that she will again be subject to such an action or that he will again seek to initiate such an action in relation to another partner as there was that Jane Roe would again be subject to the strictures of Texas abortion laws in *Roe*. In the public at large the number of such cases is on the rise. Counsel for Father have been involved in three such actions in Indiana alone. This is a matter of great public importance concerning an unsettled area of the law which requires resolution by this Court. If it is not so resolved, such cases will continue occurring and evading review until such a time as the Court agrees to either accept one on expedited appeal or to find a case, such as this one, within the exception to the mootness doctrine. In the present case, Father timely presented an application and a reapplication for a stay pending expedited consideration of this cause before this Court. But for the denial of the stay applications by this court, there would not have been a possibility of mootness, as the Mother would have been subject to contempt penalties had she defied the injunction sustained by the stay, which contempt potential would have prevented the case from becoming moot. Although counsel for the Father have received no official notice that the Wife has obtained an abortion, a newspaper article indicates that an abortion has apparently been performed. *Abortion Cleared by Courts Is Done*, Indianapolis News, Aug. 12, 1988, at B-6, col. 1.

ble decisions of this Court." Supreme Court Rule 17.1(c). The Indiana Supreme Court, in the decision below, interpreted this Court's decision in *Roe v. Wade*, 410 U.S. 113, to create an absolute right in a wife to abort the child of her marital union and interpreted this Court's decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, as precluding a court, under any and all circumstances, from taking into account, on a case by case basis, a father's fundamental rights and interests in his child when his wife wants an abortion. These interpretations of *Roe* and *Danforth* are erroneous. In addition, while *Danforth* has precluded an absolute spousal veto, this Court has not settled the extent to which father's rights and interests may be weighed by a court with the right of the wife to have an abortion.

This case presents a matter of great public importance. In every case where a woman seeks an abortion, there is either a father or a husband who is the father of the child. Over one and a half million abortions are performed yearly. In each of these cases, the rights and interests of fathers and husbands in their children are potentially at stake. Of course, actions such as the present one would only be undertaken by a father with notice of the intent of the mother to obtain an abortion and who has concern over the abortion of his unborn child. The Indiana Supreme Court, however, closed the door on the consideration of such rights and interests by barring their judicial consideration under any facts. The Indiana Supreme Court thus gave a wife an absolute veto power over any interest of her husband regarding the child they conceived within their marital union. The abortion right was made absolute and the rights and interests of husbands were forever held for naught.

In the instant case, the Father sought to enjoin the abortion because of the grave loss he would suffer if the abortion occurred — the loss of a potential opportunity to raise, nurture and enjoy the companionship of the child — comparable to the cutting off of his own arms and legs, he said. The Wife, however, wants an abortion, in part, to prevent her husband from having custody of the child at birth. She said that she would abort

unless the Father agrees to an adoption of their child by a third party. She said that she would abort if there is any chance of the Father getting custody of the child. Upon these facts, the trial court issued a preliminary injunction, to preserve the status quo, in order to consider the rights and interests of both the Father and the Wife. This the Indiana Supreme Court has forbidden, based upon an erroneous interpretation of *Roe* and *Danforth*.

This case, therefore, presents only the issue of whether fathers have sufficient rights and interests which, on the facts of an individual case,[4] a trial court may take into account, in determining whether a wife may abort their child. This case, therefore, presents an urgent question of federal law, which should be settled by this Court, and which the Indiana Supreme Court decided contrary to the applicable decisions of this Court.

A. *Roe* specifically and expressly did not consider a father's rights and explicitly declared that the right to an abortion is not absolute.

In *Roe v. Wade*, 410 U.S. 113, this Court held that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *id.* at 153, and thereby struck down a Texas criminal statute which only allowed life saving abortions. The Court viewed the abortion decision "in all its respects" as "inherently, and primarily, a medical decision," except where "important state interests provide compelling justification for [state] intervention." *Id.* at 165-66.

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[4] In a similar case, for instance, a trial court enjoined an abortion, upon the request of an unwed father, after finding that the mother wanted the abortion in order "to avoid childbirth, . . . to look nice in a bathing suit this summer, . . . not to be pregnant in the *summertime*, . . . and not to share [the father] with the baby." *In the Matter of Unborn Child H.*, No. 84C01-8804-JP-185, slip op. at 2 (Vigo (Ind.) Cir. Ct., Apr. 8, 1988), *appeal pending sub nom Doe v. Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. 1988).

The Indiana Supreme Court erroneously viewed *Roe* to have conferred on a woman "an unconditioned right to have an abortion in the first trimester." *See* p. 19a, *infra*. In fact, the Court in *Roe* considered and rejected such a claim:

> [S]ome . . . argue that the womans right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree . . . . In fact, it is not clear to us that the claim asserted by some . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests . . . .

410 U.S. at 153-54.

In addition, the *Roe* Court explicitly declared that it was not considering the question of paternal rights asserted against the woman's right to choose abortion. *Id.* at 165 n.67 ("Neither in this opinion nor in *Doe v. Bolton* . . . do we discuss the father's rights . . . .").

The abortion right in *Roe*, therefore, is not absolute and is subject to important state interests in regulation and to being weighed against competing fundamental rights and interests.

B. *Danforth* considered only a state statutory requirement of spousal consent to every abortion, which "determined that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part."[5]

The Indiana Supreme Court claims that, because the abortion decision "concerns only her," see p. 20a, *infra*, therefore *Danforth*, 428 U.S. 52, is dispositive of this case, and bars a

[5] 428 U.S. at 70 n. 11.

court from even considering a father's rights and interests in his child when his wife wants an abortion. The Indiana Supreme Court viewed the trial courts issuance of a preliminary injunction, in order to preserve the status quo, as "granting the husband the right [to veto his wife's abortion]." See p. 20a, *infra*. Because the Father "has no right *under any facts of this case* to *veto* [his wife's] decision to obtain an abortion," the Indiana Supreme Court dismissed all proceedings related to the abortion issue. *Id.* (emphasis added).

The Indiana Supreme Court misunderstood the relief sought by the Father and the trial court's decision. The Father did not seek, nor was he granted by the trial court, a right to "veto" his wife's abortion decision. The trial court restrained the abortion to preserve the status quo so that the trial court could balance the Father's "rights in the fetus grounded . . . in the Fourteenth and Ninth Amendments to the United States Constitution . . . against the Wife's constitutional right to an abortion," which the trial court viewed as "an entirely appropriate judicial function where such [competing] rights are asserted." *Id.* at 26a. Thus, the Father was seeking judicial consideration of his constitutional rights and interests, which the trial court below would consider at a final hearing, on the facts of this case, with the constitutional right of the Wife to obtain an abortion.

Danforth, 428 U.S. 52, did not involve judicial consideration of competing constitutional rights and interests on a case by case basis. Rather, *Danforth* dealt with a state statute that gave all husband's an absolute veto, for any or no reason, to the blanket exclusion of all wives. The husband (who might not even be the father, *id.* at 69) had a unilateral power to forbid an abortion by his wife, for any reason or no reason, which could not be controverted or reviewed by any higher authority. *Id.* at 71. Because the statute required the husband's consent in all cases, the wife could not get an abortion even if her husband could not be located. *Id.* at 69. The state assumed lack of consent by all husbands unless they stated otherwise. *Cf. Martin v. Struthers*, 319 U.S. 141, 144 (1943) (A statute barring religious solicitors from calling residents to their doors was

unconstitutional because *inter alia* "it substitute[d] the judgment of the community for the judgment of the individual householder.").

Faced with a statute which permanently and absolutely struck the balance of rights of parents in favor of the husband in every case, this Court held that a "State may not constitutionally require the consent of the spouse, as is specified under [the Missouri statute therein], as a condition for abortion during the first 12 weeks of pregnancy." *Danforth*, 428 U.S. at 69. Thus, this Court struck down a *per se* rule, not case by case judicial consideration of rights and interests.[6]

The majority opinion in *Danforth* was careful to clarify, in responding to the dissent by Justice White, that it was not considering the constitutionality of a more nuanced approach allowing for case by case consideration of a father's rights and interests in his child. Justice White criticized the Court's decision, claiming that:

> "the majority finds in the United States Constitution" a rule that the State *must* assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child."

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis added).

The Court responded:

> This section does much more than insure that the husband participate in the decision whether his wife should have an

[6] At one point, this Court could be misinterpreted to have engaged in balancing. In considering the Missouri spousal consent statute, this Court said: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Danforth*, 428 U.S. at 71. This Court, however, was comparing the effect of leaving the statutory *per se* absolute veto intact in every case with the effect of striking it and leaving the woman free to "act unilaterally." Given the choice between these absolutes, the Court held the rights of the wife must prevail.

> abortion. The State, instead, has determined that the husband's interest in continuing the pregnancy of his wife *always outweighs* any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to *prevent unilaterally, and for whatever reason*, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

Id. at 70-71 n.11 (emphasis added).

A comparison of the absolute spousal veto right rejected in *Danforth* and the judicial inquiry contemplated by the trial court below clearly demonstrates that *Danforth* does not apply to this case. *Danforth* described the Missouri statute as having "delegate[d] to a spouse a veto power," which was "delegated authority to a particular person . . . to prevent [an] abortion." *Id.* at 69. In the instant case, the trial court did not propose to delegate to anyone a "veto power" or to "delegate authority" to the spouse to prevent the abortion. On the contrary, it was the trial court itself which was to weigh the interests of both parties to determine whether or not an abortion should occur.[7] In addition, it cannot be said that a judicial inquiry is "unilateral," as the *Danforth* Court described the Missouri spousal veto. *Id.* at 70. The judicial inquiry herein is conducted as an adversary proceeding in which both the rights and interests of the Wife *and* the rights and interests of the Father would be considered.

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[7] That this Court does not consider a judicial rejection of an abortion decision, under proper circumstances, to be an unconstitutional "veto" is made clear by its opinions relating to parental rights when a minor is seeking an abortion. In *Danforth*, this Court also struck down an "absolute veto" right in parents. *Id.* at 72-79. If this also rejected judicial involvement as well, the question of parental involvement would have been settled in *Danforth*. This, however, is not the case. In subsequent cases, this Court has upheld, both in principle and in fact, state statutes which require a minor to seek parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 409-93 (1983). In doing so this Court rejected the view of the

(Footnote continued)

Nor does the trial court below suggest that "the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it," as the Missouri spousal veto statute would have done. *Id.* at 70 n.11. On the contrary, the trial court proposed to weigh the interests of both parties, against "a presumption that the [Wife] is entitled to an abortion," which the Father could overcome only by "clear and convincing evidence." See p. 27a, *infra*.

Finally, the trial court did not propose to enjoin the abortion "for whatever reason." *Danforth*, 428 U.S. at 70 n.11. Indeed, the trial court was careful to detail the factors which would be relevant to its decision. See pp. 26a-27a, *infra*. Thus, a judicial inquiry, weighing the interests of both parties, is fundamentally different from a Missouri spousal veto rejected in *Danforth*.

In sum, *Danforth* does not control the present case, as it did not consider whether, on a case by case basis, the constitutional rights and interests of a father could be considered along with the rights and interests of his wife, as sought in the case at bar.

II. The Father has fundamental rights and interests in his unborn child which should be judicially considered, on the facts of this case, along with the right and interests of his Wife in aborting their child.

Footnote 7 continued

dissenters that "a parental or *judicial veto* of a minor's decision to obtain an abortion . . . [is] unconstitutional." *Id.* at 504 (Blackmun, J., dissenting) (emphasis added). The requirement of parental or judicial consent was supported, in part, by the right of parents to "the custody, care and nurture" of their children. *Bellotti v. Baird (II)*, 443 U.S. 662, 638 (1979). By providing a judicial forum for the minor to seek authorization for abortion without parental consent, the statute did not "give a third party an absolute, and possibly arbitrary, veto . . . regardless of the reason for withholding the consent." *Id.* at 643. This is so even though the court could refuse consent to the abortion for the minor, if the court found that the desired abortion was not "in her best interests." *Id.* at 644.

The trial court below held that the Father had "rights in the fetus grounded . . . in the 14th and 9th Amendments to the United States Constitution." See p. 25a, *infra*. In ordering the trial court to "dismiss all proceedings relating to the abortion issue," the Indiana Supreme Court dismissed the Father's rights as "some nebulous common law concept." *Id.* at 19a. In doing so, the Indiana Supreme Court ignored well established constitutionally protected rights and interests of husbands and fathers. The Indiana Supreme Court failed to give substantial weight to these rights and interests, on the erroneous assumption that consideration of them was barred by *Danforth*.

Three principal lines of cases have discussed the importance of the Father's rights and interests: (1) those relating to procreation, (2) those relating to termination of parental rights and (3) those relating to family relations. "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This Court has long emphasized that "without doubt [the liberty guaranteed under the Fourteenth Amendment] denotes the right of the individual to . . . establish a home and bring up children . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

A. The Father has a right and interest in procreation, which is especially significant where it has become particularized in this specific, unborn child.

The term "procreation" is defined as "the entire process of bringing a new individual into the world." *Dorlands Illustrated Medical Dictionary* (24th ed. 1965). Similarly, in the recent case of *In re Baby M*, 537 A.2d 1227 (N.J. 1988), the right to procreate was defined by the New Jersey Supreme Court: "The right to procreate very simply is the right to have natural children . . . ." *Id.* at 1253. The New Jersey Supreme Court observed that Mr. Stern, the natural father, had not been deprived of that right, as Baby M was his child. *Id.* The court indicated, however, that the right of procreation did not, in and of itself, give Stern the right to the custody of the child at birth.

Id. The right to the "custody, care, companionship, and nurturing" of a child was not a part of the right to procreation, but was a separate right. *Id.*

Employing this analysis, it becomes clear that the Father's fundamental right to procreate is a right to have a natural child. Likewise, the Wife has a right to procreate. It is logically distinguishable from the right to destroy that which has been procreated — the right to abortion — which was granted to women in *Roe*.

In this case, Father and Wife have conceived, by consensual sexual intercourse, a child within their marital relationship. As a result, the Father's general procreational right has become particularized in that unborn child. He has, therefore, a distinct constitutional interest, in continuing the procreation, already begun, to birth, which the trial court sought to consider along with her right, as declared in *Roe*, to destroy the unborn child.

B. The Father has a right and interest in his unborn child, which is a natural right inherent in his biological relationship to the child.

Natural parents also have constitutional rights in the care, custody, companionship, and control of their children that a state cannot sever absent clear and convincing evidence of parental unfitness. *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, this Court held that a "preponderance of the evidence" standard of proof for termination of parental rights did not sufficiently recognize "the fundamental liberty interest of natural parents in the care, custody, and management of their child." 455 U.S. at 753. This Court observed that: "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." 455 U.S. at 753. Similarly, a state cannot discriminate on the basis of sex by making it easier to sever a father's rights in his children than it is to sever the mother's rights. *See Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

This Court, in *Stanley*, summed up the rights of fathers as follows:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious . . . than property rights[.]" "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the state can neither supply nor hinder." The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, and the Ninth Amendment.

405 U.S. at 651 (citations omitted).

Thus, the right of a father to the care, custody, and management of his child is a fundamental right. In *Santosky*, this Court indicated that the father's rights in his child originate in the liberty clause of the Fourteenth Amendment which gives families freedom of personal choice in matters of family life. 455 U.S. at 745. The father's right in his child has been declared "cognizable and substantial" under the United States Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 248 (1978).

It is perhaps too obvious to require statement that a father cannot have companionship with, provide care for, or exercise management and control over a dead, aborted child. For him to exercise his fundamental rights, the unborn child must be protected until birth. Indeed, one of the interests at the heart of the constitutionally protected parent-child relationship is that of providing "loving protection" for the child. *Rivera v.*

Minnich, 107 S.Ct. 3001, 3004 (1987). Hence, the Father herein has sought consideration of his fundamental rights and interests along with those of the Wife to determine, given the existence of competing fundamental rights, whose interests, on the facts of this case, are the weightier.

On the other hand, biology alone does not create constitutional rights in one's children. As this Court has stressed in all of its recent cases dealing with unwed father's rights, biology creates only an opportunity that the father must exercise by assuming genuine responsibility for his children. Then, their relationship is protected. Thus, the rights of even an unwed father who has had custody of his children are protected, *see Caban v. Mohammed*, *supra*, and *Stanley v. Illinois*, *supra*, but absentee fathers have no such strong rights. *Cf. Lehr v. Robertson*, 463 U.S. 248 (1983) and *Quilloin v. Walcott*, 434 U.S. 246. This Court summarized its holdings in its most recent case on the issue, *Lehr v. Robertson*, 463 U.S. 248, in which it held that a father, who had no custodial, personal, or financial relationship with his daughter in the two years since her birth, had no absolute due process right to be heard in her adoption proceedings. The Court said:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

463 U.S. at 262. In this case, by contrast, the Father has "grasp[ed] that opportunity and accept[ed] some measure of responsibility for the child's future," and thus his interest is constitutionally protected. He has accepted this responsibility especially by entering into the sacred relationship, regulated by society largely for the protection of children, known as marriage.

C. The Father also has a fundamental right and interest inherent in his status as a husband in the family unit.

By the fact of his marriage to the Wife herein, the Father has acquired additional constitutional protection. Even before privacy rights (on which the Father's rights in his unborn child are founded) were recognized as attaching to individuals, they were found to be inherent in family relationships and in the marital relationship. Thus, in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943), this Court recognized as constitutionally protected "the private realm of family life." In addition, in *Griswold v. Connecticut*, 381 U.S. 479 (1964), this Court observed:

> We deal with a right of privacy older than the Bill of Rights — older than our policital parties, older than our school systems. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.

Id. at 486. The concurrence in *Griswold* also explained the roots of the marital privacy right in the Ninth Amendment, finding it "fundamental" because it was rooted in the "traditions and [collective] conscious of our people." *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

It is clear that the right of a husband to the care, custody, companionship, and management of his children, born or unborn, is a fundamental right rooted historically in the traditions of our nation and western civilization. It is a fundamental right independent of any state delegation of power and entitled to great respect and protection.[8]

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[8] John Noonan, now Judge of the Ninth Circuit, has argued that fathers and husbands have rights in their unborn children based on: (1) the right to procreate in *Skinner*, 316 U.S. 535 ("If it did not include [the protection of the child procreated throughout pregnancy], all that a man had was a liberty to fertilize an ovum — a liberty that, if not actually meaningless, was a good deal

(Footnote continued)

Thus, husbands have three rights of constitutional dimension in their unborn children. First, they have a right to procreate, which begins with the development and preservation of the ability to procreate and extends to the birth of the child. This general right becomes particularized with the conception of an unborn child resulting from an act of consensual intercourse. This particularized right to procreate continues to the birth of that particular child. Second, husbands have rights to the care, custody, control, and companionship of their children. This right includes the "loving protection" of a child, begins at conception, and continues until the child reaches the age of majority. Finally, a husband has a constitutional right in his family relations, which include the unborn child herein.

Therefore, at the time when the child is in utero, the Father in the case at bar has three distinct constitutional rights in his unborn child. These fundamental rights and interests the trial court sought to consider with the rights of the Wife, on the facts of this case. This judicial consideration of the Father's rights and interests was prohibited by the Indiana Supreme Court upon a misreading of *Danforth*.[9]

Footnote 8 continued

less than full freedom to procreate."); (2) the right to marry in *Loving v. Virginia*, 388 U.S. 1 (1967) ("If liberty to marry did not include liberty to have children, freedom to marry meant a great deal less than full freedom to marry."); (3) the right to consent to adoption in *Armstrong v. Manzo*, 380 U.S. 545 (1965) ("[I]f a father could not lose his rights to one of his children without a hearing, even if the child was in the mother's control, he could not lose his child within the mother's womb without at least an opportunity to object."); and (4) the rights of a father set forth in *Stanley*, 405 U.S. 645 ("It could reasonably be argued that, if biology conferred rights, a father had as much interest in an unborn child of eight weeks as in an infant of eight months.") *J. Noonan, A Private Choice* 90-91 (1979).

[9] It is inconceivable that this Court, having built *Roe* on a foundation of privacy cases which protect the Father herein, *Roe*, 410 U.S. at 152-53 (citing *Griswold v. Connecticut; Meyer v. Nebraska; Loving v. Virginia; Skinner v. Oklahoma; Prince v. Massachusetts; Pierce v. Society of Sisters)*, would turn *Roe* against these privacy rights and destroy its own foundation.

III. The trial court, as a neutral arbiter of competing rights and interests, properly issued a preliminary injunction to prevent the Wife from having an abortion, pursuant to its consideration of the respective rights and interests on the facts of this case.

Unlike state action in enacting the statute at issue in *Danforth*, the action of the trial court in the instant case does not involve the state taking sides in the abortion decision. Rather, the court is acting as a neutral arbiter, evenhandedly considering competing rights and interests. The Indiana Supreme Court indicated no state law flaw in the jurisdiction of the trial court or in its issuance of a preliminary injunction. It held only that *Roe* and *Danforth* precluded judicial consideration of the Father's rights and interests.[10]

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[10] Indeed, the trial court was an appropriate forum for the resolution of such competing assertions of right. The Wife filed a dissolution action against the Father in which the Father sought the preliminary injunction herein to enjoin her from aborting their child. Under Indiana law, a trial judge in a dissolution action has full jurisdiction over all issues involved in the marriage relationship of the couple. The trial court is to hear all the facts and apply the law to make a division of the party's property and to provide for the care, custody and support of minor children. In doing so, the court may place custody of the children in either party I.C. § 31-1-11.5-21 and provide for support from and visitation with the other. I.C. § 31-1-11.5-12; I.C. § 31-1-11.5-24. The court's jurisdiction extends to unborn children of the marriage, *see L.F.R. v. R.A.R.*, 378 N.E.2d 855 (Ind. 1978), and the approved practice is to refrain from granting a dissolution while the wife is pregnant. *Id.* Indeed, the Indiana legislature manifestly wanted the divorce court to consider unborn children, since it went so far as to require verified confirmation or negation of their existance in every divorce petition. I.C. § 31-1-11.5-4(a)(4). For all children conceived by the marriage, Indiana law presumes the husband to be the father, a presumption that can only be overcome by irrefutable proof of the husband's impotence, of lack of access to the mother, of total absence or by clear and satisfactory proof of no sexual intercourse. *L.F.R.*, 378 N.E.2d at 856. Upon a finding that the wife has conceived, Indiana law "fixes a responsibility on the husband to care for that child in the same manner he cares for those already born and in existence at the time of the dissolution of the marriage." See p. 9a, *infra* (Pivarnik, J., dissenting).

(Footnote continued)

However, the preliminary injunction was proper under present interpretations of the United States Constitution. Either of two analyses provides adequate justification for the trial court's actions.

A. Under Substantive Due Process analysis, as employed in *Roe*, the Father had a compelling interest in his unborn child, on the facts which the state court found, sufficient to justify the court in limiting the Wife's liberty to have an abortion.

In *Roe*, this Court built the abortion privacy right on a Substantive Due Process analysis of the Fourteenth Amendment. Having declared that the right to abortion was fundamental, the Court proceeded to find two compelling state interests, in maternal health and in protection of "potential" human life, which were held to vary in significance with the stage in the pregnancy. For the state court to burden the Wife's liberty to choose abortion free from state interference it must have a compelling interest in doing so and the action must be "narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155.

Clearly, the state has a legitimate interest in protecting the rights of fathers in their children. Given the fact that these rights are themselves fundamental rights as against the state, there can be little doubt that the state's interest in protecting these rights constitutes a significant state interest. And where, as in this case, the interests of the Father in his child outweigh the interest of the Wife in aborting the child (as the trial court found, even using a presumption in favor of the Wife

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Footnote 10 continued

Thus, with all of the rights and responsibilities of the Father and Wife, with respect to their child, subject to determination by the trial court in the dissolution proceeding, "[i]t is incomprehensible . . . [that] this same trial court is foreclosed [by *Danforth*] from even considering the question of whether the wife should be permitted to destroy this creation of both parties in the marital relationship merely because she wants to." *Id.*

and imposing on the Father a clear and convincing evidence burden of proof) the interest of the state in protecting paternal rights and interests becomes compelling.

Moreover, such judicial consideration of the rights and interests of both parties is "narrowly tailored" to meet the task of protecting compelling interests and eliminating those that do not reach the level of being compelling. Trial courts are skilled at resolving the common assertions of competing rights as occurs commonly in dissolution and custody actions. Furthermore, only a Father who receives notice and is sufficiently concerned about his unborn child will engage in such actions. Unlike the statute in *Danforth*, there is no blanket presumption that all husbands will deny consent.

In addition, in the abortion context, this Court has demonstrated that a compelling interest is not always necessary when rights and interests of other parties are at stake. Parental rights in the abortion context have been determined to be "significant" but not "compelling." *Danforth*, 428 U.S. at 75. Even so, the parents rights and interests were considered great enough to uphold the requirement that minors get parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

From its inception, the abortion right has been regarded, not as absolute, but as a right to be weighed and balanced against other important interests. In *Roe v. Wade*, 410 U.S. 113, after describing the factors on which it based its conclusion that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to teminate her pregnancy," *id.* at 153, this Court noted that this right "must be considered against competing state interests." *Id.* at 154.

The parents' "significant" interest in their children has been found by this Court to be sufficient to support an individual case by case judicial consideration of a minor's abortion decision. On the same date that this Court issued its opinion in *Danforth*, it also decided a companion case, *Bellotti v. Baird (I)*, 428 U.S. 132 (1976). In *Danforth* this Court struck down a

statute granting a minor's parent an absolute right to veto the minor's abortion, just as it struck down an absolute spousal veto statute. In *Bellotti (I)*, however, the Court refused to strike down on its face a statute that provided for a judicial inquiry into the facts and circumstances in which a minor desires to obtain an abortion without her parents' consent. Rather, it directed the lower federal court to obtain sufficient information about the procedures involved to be able to determine whether they adequately protected the minor's rights.

> [A] . . . statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interest. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."

428 U.S. at 145.

In *Bellotti v. Baird (II)*, 443 U.S. 622 (1979), a plurality of this Court, noting that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors," *id.* at 637, set forth a scheme under which there might constitutionally be provisions "for parental notice and consent in a manner that does not unduly burden the right to seek an abortion," *id.* at 640, a scheme grounded in individual judicial determination on a case by case basis of whether a minors abortion should be authorized or precluded. In *Aschcroft*, 462 U.S. 476, a Missouri statute adopting such a scheme was approved.

As discussed above, the Father's fundamental rights and interests are at least as strong as parent's, if not stronger. When a minor seeks an abortion without parental consent, the parents right to the "management" of his child has been infringed. An abortion of the Father's child, however, is more like a parental termination proceeding which "seeks not merely

to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759. The Father, therefore, has a sufficient cognizable interest upon which to base a judicial inquiry into whether his wife will abort their child.

The fact that the trial court had an interest sufficient to burden the Wife's liberty to abort, whether characterized as "compelling" or "significant," is apparent from the facts of this case.[11] Obviously, if the preliminary injunction had not issued, the Wife would have aborted their child, permanently and irrevocably terminating his constitutional rights and interests vis-a-vis his child. Thus, the Father would have suffered a grave loss and irreparable harm. The unborn child herein could never be replaced. A life would be lost. There is no legal remedy which would replace that life. Moreover, her reasons for wanting an abortion were found by the trial court to be of less weight than his interests in the unborn child. Thus, the trial court was correct in concluding that the Father's legal remedies were inadequate and he would suffer irreparable harm if the preliminary injunction were not issued, see p. 26a, *infra*, and in issuing the preliminary injunction.

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[11] The trial court found that the Wife was approximately six weeks pregnant at the time of the hearing, see p. 23a, *infra*, and the Father is presumed to be the father of the child. *Id.* at 25a. The Wife said she wanted an abortion for three reasons: (1) she didn't think they could afford another child, (2) because the Father refused to agree to the adoption of the child once born, and (3) if there was any chance of the Father getting custody of the child, once born. *Id.* at 24a. There was no evidence that the Wife needed an abortion for medical, emotional, psychological or family reasons, or because of any unusual risks facing her if she carried the pregnancy to term. *Id.* In addition, the Wife was not in school and did not have any plans for further education. *Id.* at 22a.

Thus, on the side of the Wife, there was not evidence of any particular or unusual harm that would be occasioned by the Wife bringing the child to term. In addition, two of her reasons for abortion, that the Father refused to consent to adoption of their child and that the he might get custody of their child, were spiteful, manipulative, and retaliatory. In addition, these two reasons also indicate that the Wife does not actually object to carrying the child to term but really wants to deny to the Father the child. Finally, while this pregnancy was unplanned, the parties did plan to have a child in the near future. *Id.* at 23a.

(Footnote continued)

B. The trial court was also justified in limiting the Wife's right to have an abortion based on the traditional balancing approved by this Court where competing rights collide.

The weighing and balancing of constitutional rights and interests, on a case by case basis, is an everyday occurrence in courts throughout the nation. Parents have equal constitutional rights which are routinely weighed in making custody and visitation rights determinations in divorce and paternity actions. Similarly, criminal courts are not infrequently faced with the task of balancing the rights of a defendant to a fair trial — a right that can be undermined by pretrial publicity that taints a jury trial — against the freedom of the press. *See Nebraska v. Press Assn.* , 427 U. S. 539 (1976).

Footnote 11 continued

On behalf of the Father, the trial court found that he was a high school graduate, with college training, and a second lieutenant in the Army Reserves. *Id.* at 22a. He was in management training with his employer and, upon completion, would be eligible to be a store manager at a salary of $350 to $450 per week. *Id.* at 23a. The Father, therefore, felt financially secure and was capable of raising the child without financial support from the Wife for the child. *Id.* The Father wants the child to be born so he can raise and nurture her and give her everything he has. *Id.* If the Wife had an abortion, the Father would feel a great loss, comparable to the loss of cutting off his own arms and legs. *Id.*

Thus, on the side of the Father, there was evidence that he could financially raise the child, despite the fears of his wife. In addition, from the facts it appears that he is a responsible person with a bright future and with a sincere interest in and concern for his child. He would suffer grave emotional harm from the loss of his child. His interests outweighed hers and his threatened injury outweighed any threatened harm to the Wife. *Id.* This is particularly true in this case since there was no evidence that the Wife even consulted with a physician regarding the abortion, despite the fact that this Court has held the "the abortion decision necessarily involves a medical judgment. "*Carey v. Population Services International*, 431 U. S. 678, 699 n. 25 (1977) (citing *Roe*, 410 U. S. at 164). On these facts, therefore, the trial court had a compelling interest in the Father which it sought to protect by issuing the injunction.

These standard adjudications cannot be said to overburden either the courts or the litigants subjected to them.[12] They are a crucial part of the unique and essential role of the judiciary, which is precisely to serve as an arbiter applying neutral principles of law and considerations of equity to resolve disputes among those with competing claims of rights.

The Wife erroneously claimed below that the Father must show a compelling state interest in order for a court to balance his rights and interests against his wife's. Brief of Appellant (in the Indiana Court of Appeals) at 21-24. Although, as shown above, the state court does have a compelling interest, this argument is predicated on the claim that, in the Wife's view, the Father has no competing constitutional rights. *Id.* at 29 ("[T]he man has no enforceable rights in the fetus vis a vis the woman prior to birth."). In fact, as demonstrated above, the Father has equally fundamental constitutional rights here. The courts traditionally balance such rights, on a case by case basis, in order to determine which outweighs the other.

Thus, under the sort of analysis employed where competing rights of roughly equivalent significance collide, the court need only compare the relative weight of the competing interests to determine whose rights prevail. On the facts of this case, the Father's rights and interests prevail, as found by the trial court, and the trial court was justified in enforcing his rights in preference to those of the Wife.

IV. Denying the Father the opportunity for case by case judicial consideration of his profound rights and interests in his unborn child with those of his Wife would deprive him of his rights under the United States Constitution.

Along with his assertion that *Roe* and *Danforth* do not preclude judicial consideration of his rights and interests with

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[12] For cases rejecting "burden on the court" argument, when constitutional rights are asserted, *see Stanley*, 405 U.S. at 656 n. 8; *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

those of his wife in the context of an abortion decision, the Father also asserts positive constitutional rights to such consideration. He asserts these under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and under the reserved rights of the Ninth Amendment.

First, under Indiana's Dissolution of Marriage statute, the Wife is granted significant rights against the Father and the Father's responsibility toward any children of a marriage can be enforced. Thus, the Father may be forced by the state court, in an action initiated by the Wife, to provide the basic support needed for the survival of their child. On the other hand, if the Indiana Supreme Court's decision stands, the Father's interests in his child will be subject to absolute and irreversible termination at the unilateral and completely unreviewable discretion of the Wife. This denies the Father the Equal Protection of the law.

Second, By refusing to enforce the Father's rights and interests against the Wife, the state is depriving him of his Procedural Due Process rights as set forth above. See II(B), *supra*. At a minimum, where there are conflicting rights with regard to the child, the Father should be provided a hearing and an opportunity to have his rights and interests considered on a roughly equivalent basis with those of the Wife. Moreover, under Substantive Due Process analysis, as employed in *Roe*, where there is a fundamental right, the state must have a compelling interest in order to burden that right and the state action must be narrowly drawn to effectuate that interest. These conditions are not met in this case.

Finally, the Father asserts his rights in his unborn child and to a normal judicial forum for the assertion of his rights under the Ninth Amendment of the United States Constitution, because the rights of fathers to the care, custody, and companionship of their children are ones "retained by the people." Such rights may not be disparaged by other rights enumerated in the Constitution.

CONCLUSION

WHEREFORE, Petitioner, Erin Andrew Conn, respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Supreme Court.

Respectfully submitted,

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